STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2002
v	No. 233763 Wayne Circuit Court
RONALD W. CROSBY, Defendant-Appellant.	LC No. 00-006478-01

Before: Murphy, P.J., and Markey and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions of two counts of first-degree criminal sexual conduct. MCL 750.520b(1)(a). He was sentenced to eighty-one months to sixteen years in prison. We affirm.

Defendant first argues that the trial court erred in admitting evidence of other bad acts pursuant to MRE 404(b). We disagree. The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only "when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made." *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

In this case, the prosecutor sought to introduce evidence of a previous sexual assault on another child (i.e., defendant's nephew) to show motive, opportunity, intent, preparation, scheme, plan, system, absence of mistake, or accident under MRE 404(b), which governs admission of evidence of bad acts. MRE 404(b) provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Use of bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Starr, supra* at 496.

In this case, the trial court allowed the evidence regarding the nephew's testimony after finding that the three requirements contained in *Starr, supra* had been satisfied. The court opined that the evidence had been offered for the proper purpose of showing intent, scheme, or plan, and although there was "some prejudice" in admitting the evidence, the evidence was relevant and "very probative" because defendant denied having committed the offenses. We conclude that the trial court did not abuse its discretion in admitting the evidence. Like the trial court, we agree that the facts in the instant case are very similar to the facts in *Starr, supra* at 504, where the trial court held that the trial court did not abuse its discretion in admitting a prior victim's testimony of other acts under MRE 404(b). In *Starr supra* at 491-492, the defendant was convicted of first-degree criminal sexual conduct against his adopted daughter who was six years old at the time of the offenses. The prosecutor sought to admit evidence that the defendant had previously sexually abused his younger half-sister from the time that she was four years old until she was about eighteen. *Id*. at 492. Our Supreme Court found that the half-sister's testimony was more probative than prejudicial because no medical evidence existed to support the adopted daughter's claims, the half-sister's testimony was the only evidence that refuted the defendant's claim of fabrication, and the half-sister's testimony revealed a striking similarity between the sister's age, living arrangement, and relationship with the defendant to that of the adopted daughter. *Id*. at 502-503.

In the present case, no definite medical evidence existed to support the victim's claims, and defendant, in both instances, chose a prepubescent child to abuse who was sleeping in the home where defendant resided. In addition, in both cases, defendant got into bed with the child and anally penetrated each one in the same manner while others were present in the home. Even if the trial court's decision to allow the testimony were a close evidentiary question, we ordinarily cannot reverse in such cases. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). Further, for the same reasons we stated above, we also conclude that that defendant's due process argument fails.

Defendant also argues that the trial court improperly admitted hearsay testimony regarding the contents of the conversation between the victim and her mother. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Starr, supra* at 494.

In this case, the trial court found that the victim's mother's testimony was admissible under the hearsay exception of MRE 803A. MRE 803A provides, in part:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.

Defendant asserts that requirement #2 was not satisfied, i.e., the statement was not spontaneous because it was in response to the mother's specific questions. We conclude that on the record before us, while perhaps a close call, we cannot conclude that the trial court abused its discretion in allowing the mother's testimony regarding the victim's statements under MRE 803A. *Sabin, supra* at 67 (a decision on a close evidentiary question ordinarily cannot be an abuse of discretion). In *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996), this Court held that the victim's statements to a mediator were spontaneous under MRE 803A where they were made in response to open-ended questions. The mediator asked the victim (1) what were some of the things she liked about both parents; (2) what were some of the things she did not like about either parent; (3) what were the things either parent did that she liked or did not like; and (4) was there anything that either parent did that frightened her. *Id*. at 272 n 1. In contrast, the victim's mother in this case asked the victim how she got the stain on her underwear. When the victim began to cry, which she seldom did, the mother asked her if defendant had done something to her. Although perhaps not as "customary" and "open-ended" as the questions asked in *Dunham*, the mother in this case did not specifically inquire regarding whether defendant had sexually abused the victim or ask her detailed, leading questions. Consequently, the trial court did not abuse its discretion.

Moreover, even assuming that the trial court improperly allowed the mother's testimony because the statements were not sufficiently spontaneous, we would find any error harmless because the victim herself testified about the sexual abuse perpetrated upon her by defendant. *People v Meeboer*, 181 Mich App 365, 373-374; 449 NW2d 124 (1989), aff'd 439 NW2d 310 (1992); *People v Payne*, 37 Mich App 442, 444-445; 194 NW2d 906 (1971). Further, for the same reasons previously stated, we also conclude that defendant's due process argument fails.

With respect to defendant's last issue claiming that offense variable 11 was improperly scored, we note that the issue is moot.[1]

We affirm.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Roman S. Gribbs

[1] Defendant has moved and we have granted a motion to withdraw this third issue.